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No. 98-___

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

MARTIN CROMARTIE, *et al.*,
Appellants,

v.

JAMES B. HUNT, JR., in his official capacity as Governor of the State of North Carolina, *et al.*,
Appellees.

ON APPEAL
FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. After the 1992 and 1997 redistricting plans had been held unconstitutional as racial gerrymanders and the General Assembly had enacted a new plan, was the district court required to determine that any unconstitutional vestiges of the earlier plan had been removed before allowing the 1998 plan to be used in elections?

2. In determining whether the 1998 plan was an adequate remedy for the unconstitutional defects of the 1992 and 1997 racial gerrymanders, should the three-judge district court have placed on the State defendants the burden of proving that race did not predominate as a motive in drawing Districts 1 and 12?

LIST OF PARTIES

MARTIN CROMARTIE, THOMAS CHANDLER MUSE, R.O. EVERETT, J.H. FROELICH, JAMES RONALD LINVILLE, SUSAN HARDAWAY, ROBERT WEAVER and JOEL K. BOURNE are appellants in this case and were plaintiffs below;

JAMES B. HUNT, JR., in his official capacity as Governor of the State of North Carolina, DENNIS WICKER in his official capacity as Lieutenant Governor of the State of North Carolina, HAROLD BRUBAKER in his official capacity as Speaker of the North Carolina House of Representatives, ELAINE MARSHALL in her official capacity as Secretary of the State of North Carolina, and LARRY LEAKE, S. KATHERINE BURNETTE, FAIGER BLACKWELL, DOROTHY PRESSER and JUNE YOUNGBLOOD in their capacity as the North Carolina State Board of Elections, were defendants below and are appellees in this case.

ALFRED SMALLWOOD, DAVID MOORE, WILLIAM M. HODGES, ROBERT L. DAVIS, JR., JAN VALDER, BARNEY OFFERMAN, VIRGINIA NEWELL, CHARLES LAMBETH and GEORGE SIMKINS were allowed to intervene of right as defendants at the time of the order appealed from; and as defendant-intervenors they are included as appellees.

Apart from the defendant-intervenors who are included as appellees in this appeal, the parties in this case are the same as in the separate appeal filed earlier in *Hunt v. Cromartie*, No. 98-85, in which the present appellants, Cromartie, *et al.*, who were plaintiffs in the three-judge district court, were appellees and the present appellees, Hunt, *et al.*, who were defendants below, were appellants.

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No. 98-___

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October Term, 1998

MARTIN CROMARTIE, *et al.*,
Appellants,

v.

JAMES B. HUNT, JR., in his official capacity as Governor of the State of North Carolina, *et al.*,
Appellees.

ON APPEAL
FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

JURISDICTIONAL STATEMENT

Martin Cromartie and the other Plaintiffs below appeal from the Order of the United States District Court for the Eastern District of North Carolina, dated June 22, 1998, which denied to appellants the temporary and permanent injunction which they had sought to enjoin the State appellees from conducting any elections under the congressional redistricting plan enacted by the North Carolina General Assembly on May 21, 1998. *See* 1998 N.C. Sess. Laws, Ch. 2, amending N.C. Gen. Stat. § 163-201(a). Plaintiffs filed notice of appeal on July

17, 1998 and jurisdiction of this appeal is conferred on this Court by 28 U.S.C. § 1253.

OPINION BELOW

The June 22, 1998 opinion of the three-judge district court, which has not yet been reported, appears in the appendix to this jurisdictional statement at 1a.

JURISDICTION

The district court's order denying the injunction was entered on June 22, 1998. On July 17, 1998, appellants filed a notice of appeal to this Court. The jurisdiction of this Court is invoked under 28 U.S.C. § 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This appeal concerns the constitutionality of 1998 N.C. Sess. Laws, Ch. 2, which amended N.C. Gen. Stat. § 163-201(a); copies of this Session Law were previously lodged with the Court by the present appellants in connection with the Motion to Dismiss or, in the Alternative, to Affirm which they filed in *Hunt v. Cromartie* (No. 98-85), where they are appellees.

The present appeal involves the Equal Protection Clause of the Fourteenth Amendment which provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

> United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This appeal is taken pursuant to 28 U.S.C. § 1253 which provides:

> Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

STATEMENT OF THE CASE[1]

In *Shaw v. Hunt,* 517 U.S. 899 (1996) ("*Shaw II*"), the Court held that District 12 in North Carolina's 1992 congressional redistricting plan ("the 1992 plan") violated the Equal Protection Clause because race predominated in the design of the Twelfth Congressional District, and the plan could not survive strict scrutiny. The Court declined to consider the constitutionality of the First District in the 1992 plan because none of the plaintiffs had standing. Therefore, a separate action was initiated by Martin Cromartie and other registered voters in the First District to challenge its constitutionality.

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[1] The present appellants have provided the Court a more detailed statement of the relevant facts in their Counterstatement contained in the Motion to Dismiss or, in the Alternative, to Affirm which they filed in *Hunt v. Cromartie* (No. 98-85), which involves the same parties.

The action filed by Cromartie was stayed by consent awaiting further proceedings in the *Shaw* litigation, which had been remanded to the lower court. That court granted the State legislature an opportunity to redraw the State's congressional plan to correct its constitutional defects; and on March 31, 1997, the North Carolina General Assembly enacted a new congressional redistricting plan, 1997 Session Laws, Chapter 11 ("the 1997 plan"). The 1997 plan was precleared by the Department of Justice for use in the 1998 and subsequent elections; and in September 1997 it was accepted by the lower court as a remedy for the claim asserted by the *Shaw* plaintiffs, who under the 1997 plan were no longer residents of the Twelfth District.

Shortly thereafter, the stay in the action brought by Cromartie was dissolved; and an amended complaint was filed, which alleged that the 1997 redistricting plan was also an unconstitutional racial gerrymander and that race had predominated in drawing both its First District and its Twelfth District. The amended complaint included as plaintiffs registered voters both of the First and the Twelfth Districts.

After a hearing on March 31, 1998, the three-judge district court before which the case was pending granted summary judgment for the plaintiffs as to the Twelfth Congressional District and enjoined the defendants from conducting any primary or general election under the 1997 redistricting plan.[2] The state defendants gave notice of appeal and also applied unsuccessfully to the district court and to this Court for an emergency stay of the injunction. Subsequently, the State defendants filed a Jurisdictional Statement in this Court, *Hunt v. Cromartie* (No. 98-85); and in response the

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[2] See Appendix 1a, 4a, 45a of the Jurisdictional Statement filed in *Hunt v. Cromartie* (No. 98-85).

plaintiffs have filed a Motion to Dismiss or, in the Alternative, to Affirm, which is now pending.

Instead of immediately undertaking to draft its own redistricting plan in order to remedy the constitutional defects, the three-judge district court allowed the General Assembly an opportunity to enact still another redistricting plan. On May 21, 1998 a new plan ("the 1998 plan") was enacted, which was to be used for the 1998 and 2000 elections, unless this Court reverses the district court decision holding the 1997 plan unconstitutional. *See* 1998 N.C. Sess. Laws, Ch.2. After the Department of Justice had precleared this plan, the plaintiffs filed an opposition and objection to that plan; and the defendants responded thereto.

On June 22, 1998, the three-judge district court approved this plan "with respect to the 1998 congressional elections," because the court "concludes that on the record now before us that race cannot be held to have been the predominant factor in redrawing District 12." (Appendix at 3a.) However, the district court reserved "jurisdiction with regard to the constitutionality of District I under this plan and as to District 12 should new evidence emerge," and it directed that the case "should therefore proceed with discovery and trial accordingly." (App. at 5a.)[3] The plaintiffs gave notice of appeal with respect to this order.

ARGUMENT

Introduction

This appeal is taken to present for the Court's decision questions which concern the obligations of the three-judge

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[3] Subsequently, a discovery schedule has been approved by the district court.

district court in determining whether to accept a new redistricting plan as an adequate remedy for defects in two earlier plans held to be unconstitutional racial gerrymanders. The context for these questions is provided by the language of the order entered below denying the requested injunction. There the three-judge district court stated:

> Because the Court cannot now say that race was the predominant factor in the drawing of District 12 in the 1998 congressional districting plan, the revised plan is not in violation of the United States Constitution, and the 1998 congressional elections should proceed as scheduled in the Court's April 21 order.

(App. at 1a.) Later in the order, the court commented that it "now concludes that on the record now before us that race cannot be held to have been the predominant factor in redrawing District 12." (App. at 3a.)

Some months earlier, in rendering its memorandum opinion holding unconstitutional the State's 1997 redistricting plan, the court explained its methodology in considering a remedial plan.[4] Citing *Wise v. Lipscomb*, 437 U.S. 535 (1978), the opinion states:

> Thus, when the federal courts declare an apportionment scheme unconstitutional – as the Supreme Court did in *Shaw II* – it is appropriate, 'whenever practicable, to afford a

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[4] This memorandum opinion appears at pages 1a-23a of the jurisdictional statement submitted by the defendants, who were then appellants, in their jurisdictional statement in *Hunt v. Cromartie* (No. 98-85).

> reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure rather than for the federal court to devise and order into effect its own plan. The new legislative plan, if forthcoming, will then be the governing law unless it, too, is challenged and found to violate the Constitution.'

Wise, 437 U.S. at 540.

As the district court's language reveals, it reasoned that after a new redistricting plan has been enacted, those who wish to challenge it must start anew and the plan is to be viewed as if it had been written on a clean slate. No effort was made by the court to examine what "vestiges" of the prior racial gerrymanders might remain. The first question presented in this appeal arises out of the district court's failure to recognize or perform its duty of assuring that the "vestiges" of the unconstitutional 1992 and 1997 racial gerrymanders were eliminated.

The second question concerns the burden of proof. When the plaintiffs expressed their opposition to the 1998 plan, the district court placed on them the burden to demonstrate that race had been the predominant motive in redrawing District 12. Instead, the burden should have been placed on the defendants to show that race had not been the predominant factor; and use of the plan should not have been allowed unless the court concluded on the record before it that race had not been the predominant factor in redrawing District 12.

These errors on the part of the court below caused it to deny the temporary and permanent injunctions which plaintiffs sought. If these omissions on the district court's part are repeated at the forthcoming trial which that court has ordered,

the plaintiffs will be further prejudiced in obtaining the relief to which they are entitled. Moreover, the questions presented in this appeal have added importance because they will arise in other litigation involving the adequacy of a new redistricting plan as a remedy for a plan that a court has held to be an unconstitutional racial gerrymander.

I. The Court Below Had the Duty to Determine That No "Vestiges" of the Earlier Unconstitutional Plans Remained in the 1998 Plan.

After racial segregation of schools was held to violate equal protection guarantees, many federal district courts were required to oversee the process of school desegregation. As guidance for the district court overseeing desegregation of the Charlotte-Mecklenburg school system, this Court pointed out that once the equal protection violation had been proved, the local school authorities and the district court were required to "eliminate . . . all vestiges of state-imposed segregation." *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971).[5] In another school desegregation case, the Court made clear that the Dayton Board of Education was under a continuing duty to eradicate the effects of segregated schools. *See Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526, 537 (1979).

Consistent with these pronouncements, the Court of Appeals for the Tenth Circuit ruled that once plaintiffs had established a prima facie case of *de jure* segregation, the defendant board of education had the duty to prove that its efforts to comply with desegregation orders had "eliminated all traces of past intentional segregation to the maximum feasible extent." *Brown v. Board of Education*, 892 F.2d 851, 859 (10th

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[5] Such "vestiges" included faculty assignments, transportation, student assignments, and "racially-identifiable" schools. *See United States v. Lawrence County Sch. Dist.*, 799 F.2d 1031, 1043 (5th Cir. 1986).

Cir. 1989). Similarly, the Fifth Circuit has explained that the failure of school authorities to satisfy their obligation to eradicate the "vestiges" of *de jure* segregation is itself a constitutional violation. *See Taylor v. Ouachita Parish School Board*, 648 F.2d 959, 967-68 (1981); *see also Ross v. Houston Independent School District*, 699 F.2d 218, 225 (5th Cir. 1983) (a school system "must eradicate, root and branch, the weeds of discrimination"). Implementing the same policy of eradicating the "vestiges" of the equal protection violation implicit in racially-segregated schools, the Court of Appeals for the Fourth Circuit stated that once the violation had been established, a plaintiff is "entitled to the presumption that current disparities are causally related to prior segregation, and the burden of proving otherwise rests on the defendants." *School Bd. of the City of Richmond v. Baliles*, 829 F.2d 1308, 1311 (4th Cir. 1987). *See also Vaughan v. Board of Educ.*, 758 F.2d 983, 991 (4th Cir. 1985).

A helpful analogy is provided by cases discussing the effects of the violation of due process rights. Recognizing that evidence which is the "fruit of the poisonous tree" is inadmissible without regard to its credibility, the Court held that a confession obtained shortly after an unconstitutional search and arrest could not be received as evidence. *See Nardone v. United States*, 308 U.S. 338 (1939).[6] Similarly, a confession is inadmissible if it is the "fruit" of an illegal arrest which has preceded it. *See Brown v. Illinois*, 422 U.S. 590 (1975); *Dunaway v. New York*, 442 U.S. 200, 216-19 (1979); *Taylor v. Alabama*, 457 U.S. 687 (1982).

It seems only logical that the right of a voter to

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[6] *Wong Sun v. United States*, 371 U.S. 471 (1963), which first used the term "fruit of the poisonous tree," involved only a statutory violation rather than a violation of the Constitution.

participate in an electoral process untainted by equal protection violations should be given at least as much protection as the right of schoolchildren to be freed from the effects of racially segregated schools or of criminal defendants to be shielded from the use of evidence that was the "fruit" of violations of the Fourth Amendment. Indeed, if the right to vote is the most fundamental right of citizenship in a democracy – which seems indisputable – it should receive even more protection than other constitutional rights. Although appellants recognize that the Court is concerned that the judiciary not interfere unduly with the work of state legislatures or of the Congress, cf. *Wise v. Lipscomb*, supra, the cited precedents plainly support the proposition that the three-judge district court had the responsibility to assure that "vestiges" of an earlier racially gerrymandered redistricting plan are eliminated and that a replacement plan is not the "fruit" of the earlier unconstitutional plan.[7]

Although in the *Shaw* litigation the Court imposed the requirement that plaintiffs demonstrate that race was the predominant motive for creating the Twelfth District in the 1992 plan, appellants submit that a different test should be applied in determining whether a replacement plan retains "vestiges" of the earlier plan. Usually, in determining whether questioned legislation violates equal protection, the issue is whether that legislation would have been enacted in the

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[7] The Court has also made clear that persons guilty of a breach of trust should not retain the benefits of that breach. *See, e.g., Snepp v. United States*, 444 U.S. 507, 515 (1980) (imposing a constructive trust on proceeds received by a former CIA employee in violation of his contract with that agency.) Here, political benefits resulting from a constitutional violation are being retained by persons who participated in the violation and their retention is being justified under the guise of "incumbent protection" and "maintaining partisan balance."

absence of a race-based purpose. *See Village of Arlington Heights v. Metropolitan Dev. Corp.*, 429 U.S. 252, 265-66 (1977); cf. *Hunter v. Underwood*, 471 U.S. 222 (1985); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977); *Washington v. Davis*, 426 U.S. 229 (1976). Only if the *Arlington Heights* test is employed can a district court be assured that the "taint" of an earlier racial gerrymander has been eliminated. Moreover, having already deprived its voters of equal protection by an unconstitutional racial gerrymander – and in North Carolina's case two such gerrymanders – the legislature cannot complain if the Court applies to its most recent replacement plan the standard usually employed in determining whether equal protection requirements have been violated.

In any event, nothing in the opinion of the court below reflects any awareness on its part of its responsibility to assure that "vestiges" of the racially-gerrymandered 1992 plan were not still present in the 1998 plan.[8] Indeed, had the Court considered whether those "vestiges" were still present, it would quickly have concluded that the 1998 plan reflects no genuine attempt to eliminate "vestiges" of the 1992 plan, which this Court analogized to "apartheid" and ruled unconstitutional. Even a visual comparison of the 1998 plan with the 1992 plan, which this Court held unconstitutional, with the 1997 plan, which the district court held unconstitutional, reveals that the

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[8] Even though this Court did not rule on the constitutionality of the First District in the 1992 plan because of a lack of standing of the *Shaw* plaintiffs, Cromartie and his fellow plaintiffs – who are now appellants – have consistently claimed that the original First District was an unconstitutional racial gerrymander. If that premise is correct – which seems obvious in light of the District's demographics and lack of geographical compactness – the lower court was also under a duty to assure that the First District as it exists in the 1998 plan has none of the "vestiges" of the earlier First District and is not the "fruit" of that poisonous tree.

current plan retains many "vestiges" of its predecessors. For example, the Twelfth District still is not "geographically compact." Although not all of its counties are divided – as was true in the 1992 and 1997 plans – four of its five counties are split in the new plan; and this ratio is higher than for any of North Carolina's eleven other districts.[9]

The 1998 plan still links two of the State's most populous counties, Mecklenburg and Forsyth – which are in different Metropolitan Statistical Areas (MSAs) and different media markets and which, until 1992, had not been in the same congressional district since the eighteenth century. Moreover, in the segments of Mecklenburg and Forsyth counties included in the Twelfth District, the percentage of African-Americans is much higher than the corresponding percentage in the total population of each of these counties. Likewise, the percentage of African-Americans in each of these counties is much higher than in any of the three counties which are used to link Mecklenburg with Forsyth. Thus – just as in the 1992 plan, held unconstitutional in *Shaw* – a predominantly rural, "white corridor" was created to link artificially two unrelated black-concentrated urban cores located in separate metropolitan areas.[10] Furthermore, apart from Guilford County, which was

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[9] The only other significant splitting of counties is related to the creation of the First District, which appellants have consistently contended retains the "vestiges" of the racially-gerrymandered First District in the 1992 plan. The pending discovery and trial in this case will enable appellants even more fully to demonstrate not only that the 1992 plan's First District – which stretched from Virginia almost to South Carolina and divided numerous counties – was a flagrantly unconstitutional racial gerrymander but also that its continuing "taint" is obvious in the First District of the 1997 and 1998 plans.

[10] For another example of the use of such corridors, *see Miller v. Johnson*, 515 U.S. 900 (1995).

totally removed from District 12, only three precincts having forty percent or more African-American population were removed from the 1997 plan's District 12 when the 1998 plan was redrawn.[11]

If percentages of African-American population are reflected on a map of the state's urban areas – areas which are for the most part in the Piedmont[12] – it becomes readily apparent that the black population is sufficiently dispersed that no urban district can be drawn which will conform with traditional race-neutral redistricting principles and yet will have a population which is much more than 25% African-American. Any significantly higher concentration of African-Americans within a single district in the Piedmont – where they are primarily located in urban areas – is an obvious "vestige" of the unconstitutional 1992 and 1997 plans. Over 35% of the population of the "new" Twelfth District is African-American -- a percentage which can only be explained as the result of a predominant purpose to group voters by race across separate metropolitan areas.

In its memorandum opinion of April 14, 1998, which invalidated the 1997 redistricting plan, the three-judge district court stated that, in redrawing the plan, "the legislature may consider traditional districting criteria, including incumbency considerations, to the extent consistent with curing the

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[11] Guilford County, which has several precincts with a high percentage of African-Americans was totally removed from the Twelfth District. Ironically, Guilford County – unlike Mecklenburg County – is in the same Metropolitan Statistical Area (MSA) and same television market (DMA) as the adjacent Forsyth County; and also it is the only county in the 1997 version of District 12 that was subject to preclearance under Section 5 of the Voting Rights Act. *See* 42 U.S.C. § 1973c.

[12] Appellants lodged such maps with the Court in *Hunt v. Cromartie* (No. 98-85) in which they were the appellees.

constitutional defects."[13] Presumably, when the district court permitted use of the 1998 plan for the current elections, it was continuing to allow legislators to rely on "incumbency considerations" – to which the General Assembly admittedly had given great weight in drawing that plan.

Although appellants recognize that in the first instance a legislature may consider "incumbency" in redistricting, allowing "incumbency" to be considered when the Representatives in office have been elected pursuant to a racially-gerrymandered plan is inconsistent with eliminating the "vestiges" of that plan. The flagrantly unconstitutional 1992 plan has now been used for three congressional elections; and the present Representative for the Twelfth District has been elected three times from an unlawfully-drawn race-based district created with the express objective of assuring election of an African-American to Congress from that district. To allow a plan to be drawn which has as its purpose – or even considers – the protection of this Representative's race-based incumbency is at odds with removing the "taint" of the 1992 plan.[14] An acknowledged goal of the General Assembly was to "maintain the partisan balance of the State's congressional delegation." (App. at 4a.) Maintaining a "partisan balance" which has resulted from elections conducted under an unconstitutional race-based plan also is at odds with removing "vestiges" of the earlier gerrymandering.[15] Indeed, in North

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[13] *See Hunt v. Cromartie* (No. 98-85), Appendix to J.S., at 22a.

[14] Of course appellants are not contending that this incumbent should be disqualified from running or that an effort should be made to penalize him; but the General Assembly's effort to help him attain reelection conflicts with the basic goal of removing unconstitutional "vestiges." Also it induces in voters a loss of hope for participating in the electoral process.

[15] The same can be said with respect to the General Assembly's purpose "to keep incumbents in segregated districts and preserve the cores of those

Carolina, which now has six Democratic incumbents and six Republican incumbents, "maintaining partisan balance" is a euphemism for retaining the status quo, keeping in office incumbents elected pursuant to a race-based redistricting plan, and thereby perpetuating the unconstitutional results of the gerrymandering.[16]

As seems clear from its opinions, the three-judge district court did not recognize its duty to assure that the 1998 plan was not the "fruit of the poisonous tree." Had it done so, the court would have concluded readily that the 1998 plan was itself unconstitutional because it retained "vestiges" of its predecessor plans. In view of pending proceedings in this case – including a trial – the Court should provide clear guidance to the three-judge district court that it must satisfy itself that the "taint" of the 1992 race-based plan has been finally removed. This guidance also will greatly benefit other courts called upon to evaluate redistricting plans which replace plans held unconstitutional.

II. The District Court Should Have Placed on the State Defendants the Burden of Proving That the 1998 Plan Was Not Race-Based.

In its order allowing the congressional elections to proceed pursuant to the 1998 plan, the three-judge district court

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districts." (App. at 4a.) In this context, "cores" is the functional equivalent of "vestiges"; and protecting "cores" of racially gerrymandered congressional districts is no more to be tolerated than preserving the "vestiges" of racially segregated schools.

[16] Understandably the use of such euphemism heightens public cynicism about the purpose and value of elections. Moreover, in the present context to accept the logic of "incumbency considerations" would permit reenactment of the most flawed racially gerrymandered plan for the alleged purpose of protecting incumbents elected pursuant to that plan.

stated, "[b]ecause the Court cannot now say that race was the predominant factor in the drawing of District 12 in the 1998 congressional districting plan, the revised plan is not in violation of the United States Constitution." (App. at 1a.) Appellants have already pointed out that in dealing with a plan which replaces a racially gerrymandered plan, the standard should be that of *Arlington Heights* - whether the plan would have been adopted absent the racial motive - rather than whether "race was the predominant factor."[17]

However, even if the test is still to be whether a racial motive predominated, the State defendants - who committed the constitutional violations - should bear the burden to establish that race was *not* the predominant motive; and the burden should not have been placed on the plaintiffs to establish that race still predominated in drawing District 12. This conclusion is a logical corollary of the principle that "vestiges" of the unconstitutional plan should be eliminated. Thus, in comparable cases involving school desegregation, the burden was placed on the defendants to prove that they had eliminated the constitutional violation. Cf. *School Bd. of Richmond v. Baliles*, 829 F.2d at 1311; *Vaughan v. Board of Educ.*, 758 F.2d at 991.[18]

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[17] In *Wise v. Lipscomb*, 437 U.S. at 540, the Court stated, "The new legislative plan, if forthcoming, will then be the governing law unless it, too, is challenged and found to violate the Constitution." However, appellants do not interpret this statement to mean that when the new plan "is challenged," that challenge will be considered as if there had been no preceding violation. Not to consider the prior violations would conflict with the principle that "vestiges" of an unconstitutional plan should be eliminated and also would facilitate evasion of equal protection guarantees.

[18] Similarly, the burden of proof seems to have been placed on the prosecution to demonstrate that the "taint" arising out of an illegal arrest in violation of the Fourth Amendment had been eliminated prior to obtaining

The misallocation of burden of proof helped lead the court below to an erroneous result. It is especially important that this error not be repeated in future proceedings in this case or duplicated in other litigation which concerns the remedying of unconstitutional racial gerrymanders.

CONCLUSION

The three-judge district court erred in denying appellants their requested injunction against use of the 1998 redistricting plan in any congressional primary or election. Therefore, its order should be set aside and the Court should provide clear guidance to the court below as to its full scope of its responsibilities in reviewing the 1998 plan. This guidance also will help other courts avoid similar errors in future redistricting cases.

Respectfully submitted, this the 15th day of September, 1998.

ROBINSON O. EVERETT*

MARTIN B. McGEE

Attorneys for the Appellants

**Counsel of Record*

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a confession. *See Taylor v. Alabama*, 457 U.S. at 690; *Dunaway v. New York*, 442 U.S. at 216-19; *Brown v. Illinois*, 422 U.S. at 603-4.

APPENDIX

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ORDER OF UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, JUNE 22, 1998

[Caption omitted in printing]

This matter is before the Court on the Defendants' submission of a congressional districting plan for the 1998 congressional elections (the "1998 plan"). By Order dated April 21, 1998, this Court directed the North Carolina General Assembly to enact legislation revising the 1997 congressional districting plan and to submit copies to the Court. The General Assembly enacted House Bill 1394, Session Law 1998-2, redistricting the State of North Carolina's twelve congressional districts, and the Defendants timely submitted the 1998 plan to the Court. The Plaintiffs subsequently filed an opposition and objections to the 1998 plan, and the Defendants have responded to the Plaintiffs' objections. On June 8, 1998, the United States Department of Justice precleared the 1998 plan pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, and this Court must now decided whether the 1998 plan complies with the Equal Proteetion Clause of the United States Constitution.

Because the Court cannot now say that race was the predominant factor in the drawing of District 12 in the 1998 congressional districting plan, the revised plan is not in violation of the United States Constitution, and the 1998 congressional elections should proceed as scheduled in the Court's April 21 Order.

* * * *

In *Shaw v. Hunt,* the United States Supreme Court considered challenges to North Carolina's 1992 congressional

districting plan (the "1992 plan") and held that the Twelfth Congressional District ("District 12") in the 1992 plan was drawn with race as the predominant factor, that the districting plan was not narrowly tailored to serve a compelling state interest, and that the 1992 plan violated the Equal Protection Clause. 509 U.S. 630, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993) ("*Shaw I*"); 517 U.S. 899, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996) ("*Shaw II*").

After the North Carolina General Assembly redrew the State's congressional districting plan in 1997, the Plaintiffs in this action challenged the constitutionality of the 1997 plan in this Court. Specifically, the Plaintiffs argued that the Twelfth and First Congressional Districts were unconstitutional racial gerrymanders. Each party moved for summary judgment, and in an Order dated April 3, 1998, the Court granted summary judgment in favor of the Plaintiffs with respect to District 12. Like the Supreme Court in *Shaw*, this Court held that race was the predominant factor in the drawing of District 12 in the 1997 plan, and that the district was violative of Equal Protection. In its April 3 Order, the Court instructed the Defendants to submit a new plan in which race was not the predominant factor in the drawing of District 12.

The Court found that neither party could prevail as a matter of law with respect to District 1, and denied summary judgment as to that district. Neither this Court nor the Supreme Court in *Shaw* has made a legal ruling on the constitutionality of District 1 under the 1992, 1997, or 1998 congressional districting plans.

* * * *

In *Wise v. Lipscomb* the Supreme Court advised that "[w]hen a federal court declares an existing apportionment

scheme unconstitutional, it is . . . appropriate, whenever practicable, to afford a reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure rather than for the federal court to devise and order into effect its own plan." 437 U.S. 535, 540, 98 S.Ct. 2493, 2497, 57 L.Ed.2d 411 (1978). In reevaluating a substitute district plan, the court must be cognizant that "a state's freedom of choice to devise a substitute for an apportionment plan found unconstitutional, either in whole or in part, should not be restricted beyond the clear commands of the Equal Protection Clause." *Id.* (quoting *Burns v. Richardson*, 384 U.S. 73, 85, 86 S.Ct. 1286, 1293, 16 L.Ed.2d 376 (1966)). Finally, as the Supreme Court has noted, because "federal court review of districting legislation represents a serious intrusion on the most vital of local functions," this Court must "exercise extraordinary caution in adjudicating" the issues now before it. *Miller v. Johnson*, 515 U.S. 900, 916, 115 S.Ct. 2475, 2488, 132 L.Ed.2d 762 (1995).

Because this Court held only that District 12 in the 1997 plan unconstitutionally used race as the predominant factor in drawing District 12, the Court is now limited to deciding whether race was the predominant factor in the redrawing of District 12 in the 1998 plan. In reviewing the General Assembly's 1998 plan, the Court now concludes that on the record now before us that race cannot be held to have been the predominant factor in redrawing District 12. In enacting the 1998 plan, the General Assembly aimed to specifically address this Court's concerns about District 12. Thus, the present showing supports the proposition that the primary goal of the legislature in drafting the new plan was "to eliminate the constitutional defects in District 12." Aff. of Gerry F. Cohen. The State also hoped to change as few districts as possible, to maintain the partisan balance of the State's congressional delegation, to keep incumbents in separate districts and

preserve the cores of those districts, and to reduce the division of counties and cities, especially where the Court found the divisions were based on racial lines. *Id.*

With the foregoing in mind, the General Assembly successfully addressed the concerns noted by the Court in its Memorandum Opinion for the purposes of the instant Order. Thus, the 1998 plan includes a Twelfth Congressional District with fewer counties, fewer divided counties, a more "regular" geographic shape, fewer divided towns, and higher dispersion and perimeter compactness measures. District 12 now contains five, rather than six, counties, and one of those counties is whole. District 12 no longer contains any part of the City of Greensboro or Guilford County. The 1998 plan no longer divides Thomasville, Salisbury, Spencer, or Statesville. The new plan also addresses the Court's concern that it not assign precincts on a racial basis. While the Court noted in its Memorandum Opinion that the 1997 plan excepted form District 12 many adjacent "voting precincts with less than 35 percent African-American population, but heavily Democratic voting registrations," the 1998 plan includes fourteen precincts in Mecklenburg County in which previous Democratic performance was sufficient to further the State's interest in maintaining the partisan balance within the congressional delegation. The General Assembly also added several Forsyth County precincts to smooth and regularize the District's boundaries. These changes resulted in a total African-American population in District 12 of 35 percent of the total population of the district, down from 46 percent under the 1997 plan.

* * * *

Based on the foregoing, the Court now accepts the 1998 plan as written. The 1998 congressional elections will thus proceed under this plan, as scheduled in this Court's April 21,

1998, Order. As noted above, neither this Court nor any other has made a legal ruling on the constitutionality of District 1. The 1998 plan is only approved with respect to the 1998 congressional elections, but the Court reserves jurisdiction with regard to the constitutionality of District 1 under this plan and as to District 12 should new evidence emerge. This matter should therefore proceed with discovery and trial accordingly. The parties are ordered to submit proposed discovery schedules to the Court on or before June 30, 1998.

SO ORDERED.

This 19th day of June, 1998.

SAM J. ERVIN, III
United States Circuit Judge

TERRENCE W. BOYLE
Chief United States District Judge

RICHARD L. VOORHEES
United States District Judge

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Martin Cromartie, *et al.*, the plaintiffs above-named, hereby appeal to the Supreme Court of the United States from the Order of the three-judge District Court dated June 19, 1998, approving the 1998 congressional redistricting plan for use in the 1998 congressional elections in accordance with the schedule provided in the Court's April 21, 1998 Order.

This appeal is taken pursuant to 28 U.S.C. § 1253.

Respectfully submitted, this the 17th day of July, 1998.

/s/ Robinson O. Everett

/s/ Martin B. McGee